82-625

Office - Supreme Court, U.S.
FILED
SEP 25 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

JOHN DEAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GIROLAMI, EDMONDSON,
POOLE & WOOD
L. S. EDMONDSON
1100 Puget Sound Bank Bldg.
Tacoma, Washington 98402
(206) 272-4205
Counsel for Defendant

HERBERT GELMAN
Attorney at Law
505 American Federal Building
Tacoma, Washington 98402
(206) 383-4611

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to declare a mistrial and ordering a new trial for prosecutorial misconduct in questioning petitioner about non-existent prior criminal drug smuggling conduct.

2. Whether the trial court erred in denying petitioner's motion to suppress evidence obtained pursuant to Civil Summons proceeding in *United States v. Dean*, C79-646M and in violation of petitioner's rights.

3. Whether wages earned by the taxpayer may lawfully be taxed by Congress in their entirety.

4. Whether the trial court erred in failing to grant petitioner's motions to dismiss for lack of jurisdiction and venue.

5. Whether the trial courts denial of petitioner's proposed jury instructions precluded defendant from arguing his theory of the case.

6. Whether the trial court and the U.S. Magistrate erred in failing to appoint an attorney at government expense.

7. Whether the trial court abused its discretion in sentencing petitioner to the maximum allowed by law and by requiring petitioner to post both cost and appeal bonds.

In the Supreme Court of the United States

October Term, 1982

No. 81-1506

JOHN DEAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, JOHN DEAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

	Page
Questions Presented	i
Caption of Case	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	vi
Jurisdiction	vi
Applicable Constitutional Provisions and Statutes	vi
Statement of Case	1
I	3
II	5
III	7
IV	8
V	11
VI	12
VII	12
Conclusion	13

TABLE OF AUTHORITIES

CASES

	Page
Brushaber v. Union Pacific Railroad, 240 U.S. 1 (1916)	12
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	5
Eisner v. Macomber, 252 U.S. 1 89 (1920)	7,12
Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959)	4
Stepler v. U.S., 21 F.Supp. 737 (1921)	12
Thurmond v. U.S., 316 F.2d 205 (9th Cir. 1963)	4
U.S. v. Bettenhause, 499 F.2d 1223 (10th Cir. 1974)	10
U.S. v. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973)	11
U.S. v. Brown, 419 F.2d 1368 (6th Cir. 1975)	4
U.S. v. Dahlstrum, 493 F.Supp. 966 (C.D. Cal. 1980)	6
U.S. v. Dean, 435 F.2d 1 (6th Cir. 1970)	4
U.S. v. Escoto-Nieto, 417 F.2d 623 (9th Cir. 1969)	4
U.S. v. Dow, 457 F.2d 246 (7th Cir. 1972)	4
U.S. v. Fernandez, 497 F.2d 730 (9th Cir. 1974)	5
U.S. v. Flaxman, 304 F.Supp. 1301 (Dist. Ct. N.Y. 1969)	10
U.S. v. Garner, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976)	5, 11
U.S. v. Hernandez-Salazar, 471 F.2d 1209 (9th Cir. 1970)	13
U.S. v. Kaplan, 554 F.2d 958 (9th Cir. 1977)	11
U.S. v. Kenny, 645 F.2d 1323 (9th Cir. 1981)	11
U.S. v. LaSalle National Bank, 437 U.S. 298, 57 L.Ed.2d 221 (1978)	6

TABLE OF AUTHORITIES-Cont'd.

CASES	Page
U.S. v. Mancino, 179 F.Supp. 897 (Dist. Ct. N.YU. 1959)	10
U.S. v. Perry, 512 F.2d 805 (6th Cir. 1975)	4
U.S. v. Sibley, 595 F.2d 1162 (9th Cir. 1979)	11
U.S. v. Sullivan, 274 U.S. 259, 47 S.Ct. 607 71 L.Ed. 1037 (1927)	11

OPINIONS BELOW

The unreported opinions of the Court of Appeals for the Ninth Circuit appear in the Appendix herein. No opinion was rendered by the District Court for the Western District of Washington.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 9, 1982, time unknown. An order denying petitioner's motion for rehearing and suggestion for rehearing *en banc* was entered on July 27, 1982, time unknown, and this Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under Title 26 United States Code Section 7203 and Title 28 United States Code Section 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

ORDERS 1a-3a

CONSTITUTION
- Article 1 Section 9 ..... 4a
- Amendment XVI 4a

FEDERAL STATUTES
- Title 18 U.S.C., Section 3006A 5a
- Title 18 U.S.C., Section 3231 ..... 7a
- Title 26 U.S.C., Section 7203 ..... 8a

FEDERAL COURT RULES
- Rule 5, F.R. Cr. Proc 8a
- Rule 12, F.R. Cr. Proc 9a
- Rule 404(b) F.R. Evid 10a
- Rule 609 F.R. Evid 10a

STATEMENT OF THE CASE

This matter stems from a conviction of failure to file an income tax return for 1976 pursuant to Title 26, United States Code, Section 7203. Judgment of conviction was entered on August 7, 1981 and modified on August 14, 1981. Petitioner, JOHN L. DEAN, was sentenced to one (1) year imprisonment, fined $10,000.00 and ordered to pay costs of prosecution in the amount of $4,617.25. An appeal bond was set in the amount of $10,000.00. The petitioner filed his notice of appeal from the original judgment on August 7, 1981 and the docket fee was paid on August 13, 1981. An amended Notice of Appeal was filed on August 14, 1981. The petitioner posted the security bond of $14,617.25 and the appeal bond of $10,000.00

Petitioner, JOHN L. DEAN, was charged by information with failure to file an income tax return for the year 1976 in violation of Title 26 United States Code, Section 7203. A summons was sent to Mr. Dean and on April 22, 1981, he appeared pro se, before United States Magistrate ROBERT COOPER. (Initial hearing – TR 1.) At this initial hearing, petitioner requested the appointment of counsel. (Initial hearing – TR3.) At that time the arraignment was continued until Wednesday, April 29, 1981 and the defendant was released on his own personal recognizance pending the arraignment (Initial Hearing – TR 5). On April 29, 1981, Mr. Dean appeared again before United States Magistrate Cooper and again, requested appointment of counsel. (Arraignment – TR 1-3.) Magistrate Cooper declined to appoint an attorney at government expense and thereafter conducted the arraignment of the defendant. (Arraignment – TR 5.) Magistrate Cooper entered a plea of not guilty on behalf of the petitioner because the petitioner did not wish to enter a plea without the assistance of counsel (Arraignment – TR 4). On April 30, 1981, the petitioner filed numerous objections to proceedings in the United States District Court, including objection to the jurisdiction of the Court.

On May 19, 1981, Judge Tanner conducted a status conference with the government with Mr. Dean present. Mr. Dean, again, appeared pro se and he again requested the

appointment of counsel, and again objected to any hearings without benefit of counsel. (Status hearing – TR 2-5.) At this hearing, Mr. Dean advised the Court that he had the financial ability to pay for an attorney but had been unable to obtain an attorney. (Status hearing – TR 6.) The Court also noted that petitioner, pro se, had filed a motion to dismiss and a motion to suppress evidence. (Status hearing – TR 9.)

Thereafter, the undersigned was appointed by the Court as counsel. On June 15, 1981, a jury was selected and the case continued until June 18, 1981. The petitioner renewed all of his previously made motions and these motions were denied. (TR – 34-35.)

The government presented evidence that Mr. Dean filed an income tax return which contained a request for a refund. (Plaintiff's Exhibit 9.) The government contended that petitioner received over $55,000.00 gross income. (Trial – TR 154-155.) (Plaintiff's Exhibit 18.) The government denied receiving a copy of the petitioner's W-2 attachment. (Defendant's Exhibit A & B.) The income tax return for 1976 introduced by the government as Exhibit 9 had staple holes at the place indicated for the attachment of W-2 forms. Mr. Fernelius, the IRS tax examiner, testified that if W-2 forms had been attached to the form 1040 for 1976 that he would have been able to calculate a tax liability for the petitioner and that the defendant's filing would have constituted a return. (Trial – TR 85.)

The petitioner's 1976 tax return indicated that in April, 1977, he was a resident of Olympia, Washington. (Plaintiff's Exhibit 9.) The Trans-World Airlines W-2, which was introduced as petitioner's Exhibit A, indicated that the petitioner's W-2 forms were mailed to Olympia, Washington within the District after the end of the calendar year 1976. The petitioner testified that he did not move to Olympia, Washington until after the first of the year, 1977 (Trial – TR 200). The government introduced a deed indicating that he had purchased property in Olympia, Washington in November, 1976 (Plaintiff's Exhibit 25) (Trial – TR 195). Petitioner testified that he lived outside of the Western District of Washington through the entire calendar year 1976 (Trial – TR 200). The 1040 forms introduced by the

government as Exhibits 1, 2, 3 and 7 covering the calendar years 1972, 1973, 1974 and 1975 reflect that Mr. Dean was a resident of Kansas City, Missouri on the date those tax returns were prepared. There was no evidence that the petitioner lived or was a resident of the Western District of Washington during the calendar year 1976.

The petitioner testified at length about his reasons for asserting his objections on the Form 1040. (Trial – TR 172-200.) He carefully entered his objection in each block as he thought the law required, attached W-2 forms to the return and mailed it.

The second question asked of petitioner on cross examination was "Were you smuggling narcotics?" (Trial – TR 237.) Petitioner's objection was sutained but his motion for mistrial was not granted (Trial TR – 237-238; 258-261.) At the hearing on petitioner's mistrial motion, the government admitted that it had "no indication that Mr. Dean was involved in other criminal activities." (Trial – TR 263.)

The jury returned a verdict of guilty. (Polling – TR 1.) Immediately after the polling of the jury, petitioner moved for a continuance of his personal recognizance bond pending date for sentencing. The trial Court refused to consider such a bond and refused to permit the petitioner a hearing on the bail issue. (Polling – TR 4-5.) The trial Court refused even to permit filing a bond, but insisted that cash be deposited. (Polling – TR 4.) After the sentencing on August 7, 1981, and the cost hearing on August 14, 1981, the Court required petitioner to file additional cost bonds in the total sum of $14,617.25. (Sentencing – TR 22-23.)

REASONS FOR GRANTING THE WRIT

I

The second question asked of petitioner on cross examination was whether he smuggled narcotics (Trial – TR 237.) There was no attempt by the government's attorney to lay a foundation or otherwise establish conditions for proper impeachment. Both Federal Rules of Evidence 404(b) and 609 permit introduction of otherwise impermissible evidence of prior wrongdoing. Neither rule was complied with nor relied

upon in this case by the government. In *Thurmond v. United States*, 316 F.2d 205 (9th Cir. 1963), this Court ordered a new trial for a similar error. At page 206 the Court stated:

> "It was error to suggest by leading questions on cross-examination of appellant that he had participated in specific acts of criminal conduct, not resulting in convictions, other than those with which he was charged."

See also, *United States v. Excoto-Nieto*, 417 F.2d 623 (9th Cir. 1969).

In *United States v. Perry*, 512 F.2d 805 (6th Cir., 1975) the Sixth Circuit reversed a conviction of forgery for the prosecutor's question about "the Dixie Mafia." See also, *United States v. Brown*, 519 F.2d 1368 (6th Cir., 1975); *United States v. Dow*, 457 F.2d 246 (7th Cir. 1972); *United States v. Dean*, 435 F.2d 1 (6th Cir. 1970).

A cautionary instruction was requested by petitioner but only after the trial Court refused to order a new trial. However, such instructions will not cure the error. *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed2d 1250 (1959); *Thurmond v. United States*, 316 F.2d 205 (9th Cir. 1963).

In this case, the prosecutorial misconduct denied petitioner a fair trial. The petitioner's principal defense was on the factual question of whether his conduct was or was not willful. The prosecutor's initiation of cross-examination by such a highly prejudicial question can only be understood as an unauthorized and unfair attack on petitioner's credibility and character. The fact of petitioner's filing a 1976 form 1040 and the contents of the form were not disputed by petitioner. The critical factual issue was whether petitioner held an honest belief that he was lawfully entitled to file in the fashion he did. The combination of the early reference to narcotics and smuggling, the "teasing" out of defendant the fact of Mr. Garner's gambling activities and the general use of ridicule in the examination of petitioner about his political beliefs reveals the prosecutor's true motive for injecting the fictional narcotics and smuggling activities early in his cross-examination. That motive was to prejudice the petitioner before the jury and thus establish that petitioner could not be believed as to the honesty of his convictions that he filled out

the 1040 form as required by his understanding of the *Garner* decision. If, as the government contends, the question was designed to meet a 5th Amendment challenge, then why was no foundation laid and why were these two highly emotional ideas introduced at the very outset of the cross-examination. The simple fact of the matter is that petitioner was intentionally "smeared" at the outset of his cross-examination by a wholly indefensible suggestion that violated petitioner's constitutional right to a fair trial.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) the Supreme Court held that before an error can be harmless, the reviewing Court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Id* at 87 S.Ct. 828; *U.S. v. Fernandez*, 497 F.2d 730 (9th Cir. 1974). In order to find petitioner guilty of the crime charged in this case, the jury had to disbelieve the petitioner on two crucial factual issues: 1) the honesty of his belief that he followed the law in the *Garner* decision in filling out his form 1040 and 2) that he did not attach W-2 forms to the Form 1040. On both issues the form 1040 which was introduced in evidence substantiated and corroborated petitioner's factual contention. Each line of the Form 1040 left without figures was carefully footnoted to petitioner's objections and staple holes were present in the form at the place indicated where W-2 forms were to be attached. Thus, the credibility of petitioner was a critical issue. The tactics of the prosecution are not excusable under the harmless error rule, beyond a reasonable doubt.

The judgment of conviction should be reversed and the case remanded for a new trial.

II

Petitioner filed a motion to suppress evidence obtained through a Civil Summons proceeding in *U.S. v. Samson*, Docket No., Civil No. C79-646M, United States District Court for the Western District of Washington at Seattle. Extensive findings of fact and conclusions of law and orders have been filed in that matter relating to discovery of petitioner's financial data during the calendar year 1976. The evidence is

uncontradicted that petitioner was first interrogated in 1977 by an IRS criminal investigator and given *Miranda* warnings. The prior history of IRS criminal investigations in 1977, followed by the 1979 Civil Summons proceeding, followed by the 1980 criminal charges filed in this case clearly indicated that petitioner's repeated request for a suppression hearing should have been granted by the District Court. The petitioner's motion was filed on May 12, 1981 and conforms with Rule 12 of the Federal Rules of Criminal Procedure. The trial Court denied petitioner a hearing and refused to suppress any evidence. When the government responded to petitioner Dean's motion, it appended the Findings entered by Magistrate Weinberg in Civil No. C79-646M. Finding No. 13 acknowledges that the Civil Summons proceeding was "being conducted for two purposes: determining [Mr. Dean's] civil tax liability and ascertaining any criminal prosecution potential." In view of the fact that plaintiff's exhibit 9 (petitioner's 1976 Form 1040) contains a demand for a refund of more than the statutorily required amount of gross income required to trigger the filing requirement, the joint motive asserted by the government in the Civil Summons proceeding is clearly a deception. While petitioner's Form 1040 for 1976 contained few figures it was sufficient to advise the government of his demand for a refund. This is not a tax fraud or other case where determination of tax liability is important. The existence of the statutorily required amount of gross income is the only important fact the government needed in view of the petitioner's Form 1040 for 1976. That form provided them with that fact. Accordingly, it is clear that the government knew everything it needed to know to make its determination whether to file this criminal action *before* it even commenced its Summons enforcement case. Accordingly, the trial Court should have held a hearing and suppressed all evidence obtained by the government pursuant to it prior Civil Summons enforcement proceeding. See *United States v. La Salle National Bank*, 437 U.S. 298 47 L.Ed.2d 221 (1978). In flagrant cases of government overreaching, dismissal of indictment is required. *U.S. v. Dahlstrum*, 493 F.Supp. 966 (C.D. Ca. 1980). Accordingly this Court should reverse the petitioner's conviction.

III

Since the introduction of income tax provisions in the United States near the beginning of this century, controversy has surrounded both the concept and the scope of the term income. Review of early income tax provisions by this Court resulted in rulings striking down these provisions as violative of Article I Section 9 of the United States Constitution. See, *Pollock V. Farmers Loan and Trust*, 158 U.S. 601 (1895). Amendment XVI to the U.S. Consitution and laws promulgated thereunder were intended to alleviate the likelihood that a tax on income would be held to be a direct tax. Yet, in *Eisner v. Macomber*, 252 U.S. 189 (1919), an early post-sixteenth Amendment case, this Court recognized that a direct tax remained unconstitutional by the terms of Amendment XVI, regardless of Congressional intent.

> In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter may also have proper effect, it becomes essential to distinguish between what is and what is not "income"... Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution...

Id at 206.

The Court continued by defining income:

> [W]e find little to add to the succinct definition adopted in the two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence v. Howbert*, 231 U.S. 399, 415; *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185)— "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets

Id at 207.

Thus defined, the "proper effect" to be given income tax provisions is one reflective of the Constitutional prohibition of direct taxes. That is, the income to be taxed is the gain derived from the labor, and not the labor itself. The same fundamental concept is clearly set forth in the Sixteenth

Amendment – "incomes, *from* whatever *source derived*" . . . ,
Id

> *"Derived-from-capital"*; - "The *gain-derived*-from-capital," etc. Here we have the essential matter: *not* a gain *accruing* to capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being *"derived,"* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal; – that is income derived from property. Nothing else answers this description.

Id

Just as taxes directly laid upon capital would violate Article I Section 9 of the Constitution, so do taxes laid directly upon labor. The United States cannot, therefore, tax wages earned in entirety without violating the Constitution. If the United States may properly tax wages earned at all, it may tax only the gain "derived from" labor. Currently, earned wages are taxed in entirety, thus imposing the equivalent of a direct tax on labor in violation of Article I Section IX of the U.S. Constitution. While acknowledging the existence of valuation problems in determining the "gain derived from" labor, the problems must be faced before taxation of wages earned will accord with the letter and spirit of the Constitution.

Based on the above, the judgment of conviction should be reversed and the case remanded for a new trial.

IV

This Court lacks jurisdiction to hear this case because the Congress failed to specifically grant subject matter jurisdiction over criminal violations to the federal Courts. Title 18, United States Code, Section 3231 states in part that District Courts have "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." On its face, it appears to grant jurisdiction to try petitioner for a violation of Title 26 U.S.C. Section 7203. However, 18 U.S.C. Section 3231 grants original jurisdiction over only those crimes contained in Title 18 United States

Code. Congress never intended Section 3231 to cover violations of Title 26.

In 1948, Title 18 U.S.C. Section 3231 was created primarily out of Title 18 U.S.C. Section 546 and 547, 1940 ed. Section 546 of the 1940 version of Title 18 limited the reach of the statute to "the crimes and offenses defined *in this title.*" (Emphasis supplied.) Arguably, the alteration of this language to that of the present Title 18 U.S.C. Section 3231 effected to change in the coverage of the statute. However, the Court should note that the reviser's note states that the first sentence was rewritten to preserve provisions of the 1940 ed. Title 28 U.S.C. Section 371(1) which provided that the District Courts had original jurisdiction of all offenses against the laws of the United States "exclusive of the State Courts." The provision of this former statute in Title 28 that gave District Courts "exclusive" jurisdiction was not then incorporated in the 1940 ed. of Title 18 U.S.C., Section 546. Sections 546 and 547 dealt *separately* with "exclusive" jurisdiction (Section 546) and "concurrent" jurisdiction (Section 547). Arguably, the consolidation of the 1940 ed. of Title 28 U.S.C. Section 371(1) with Title 18 U.S.C. 546 and 547 into one new Title 18 U.S.C. 3231 retained the exclusive jurisdiction of U.S. District Courts feature as well as limiting the reach of the statute to Title 18 offenses as before. Accordingly, although counsel has found no decision squarely resolving this matter, the proper interpretation of the current Title 18 U.S.C. Section 3231 is to limit its reach to only Title 18 offenses. Accordingly, since there are no other statutes conferring original jurisdiction over Title 26 U.S.C. Section 7203, this District Court was without jurisdiction to hear this case and petitioner's conviction must be reversed.

Lack of Venue

At the initial hearing in this matter the petitioner filed a document entitled "Appearance by Defendant" in which he stated in part that he did "not concede that this Court is the proper Court to hear this unsupported charge." Thereafter at every hearing the petitioner objected to jurisdiction of the Court. It is apparent from the "Appearance by Defendant" as

well as by paragraph 5 of petitioner's "Memoranda in Support of All Motions to Date" filed in District Court on May 13, 1981 that petitioner properly objected to the venue of the Court. Rule 18 of the Federal Rules of Criminal Procedure provides in part that "except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

The only evidence of petitioner's presence within the State of Washington during calendar year 1976 was a deed to certain real property. Petitioner testified that he did not move from Missouri to Washington until after January 1, 1977. Accordingly, the alleged "offense" could not have been committed within the venue of the Western District of Washington. Proving proper venue is part of the government's case without which there can be no conviction. *U.S. v. Mancino*, 179 F. Supp. 897 (Dist. Ct. N.Y. 1959); *U.S. v. Flaxman*, 304 F. Supp. 1301 (Dist. Ct. N.Y. 1969).

Petitioner requested in his proposed instruction 3 that the jury be instructed on this issue but the trial Court refused to give the instruction. Erroneously, the trial Court failed to instruct the jury on the disputed venue issue, notwithstanding that proper instructions were proposed. However, the Court should note that in *United States v. Bettenhausen*, 499 F.2d 1223 (10th Cir. 1974) the Court seems to say that the District in which the return was mailed is the district of proper venue. However, the *Bettenhausen* case is distinguished from this in that Mr. Dean earned no income in the Western District of Washington where the return was mailed and did not reside there until *after* the end of the calendar year. While the petitioner's return was prepared and mailed from Olympia, Washington, these acts occurred in April, 1977, after the ye in question. It is undisputed that the applicable IRS regulations required petitioner to file his 1976 return as if he still lived in Kansas City, Missouri and that district was the proper district in which venue lay. Moreover, since the regulations place geographic requirements on the filing of the return and since Title 26 U.S.C. Section 7302 makes unlawful the failure to file pursuant to those regulations, the proof that the acts were done within the district alleged in the information is jurisdictional as well as relating to venue. The

information is this case alleged that the acts occurred or failed to occur in the Western District of Washington. The trial Court, however, as noted above, refused to instruct on the disputed jurisdictional issue notwithstanding that proper instructions were proposed. For this reason this Court should reverse the defendant-appellant's conviction.

V

As stated in *U.S. v. Kenny*, 645 F.2d 1323 (9th Cir. 1981) at 1337:

> [11] "When a defendant's jury instructions have been refused, the following principles apply. The jury must be instructed as to the defense theory of the case, but the exact language proposed by the defendant need not be used, and it is not error to refuse a proposed instruction so long as the other instructions in their entirety cover that theory. The court examines the instructions as a whole, rather than merely viewing the failure to give any one instruction. *United States v. Sibley*, 595 F.2d 1162, 1165 (9th Cir. 1979); *United States v. Kaplan*, 554 F2d 958, 968 (9th Cir. 1977), *cert. denied*, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315 (1978)."

In this case, the Court failed to adequately instruct on the petitioner's theory of the case. Moreover, by giving conflicting instructions concerning "willfullness", the petitioner was denied a fair trial on that defense.

Petitioner's proposed instructions Nos. 5, 6, and 7 accurately reflect the theory of petitioner's defense. These instructions are virtually quotations from Supreme Court decisions. *U.S. v. Bishop*, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973) (Inst. 5); *U.S. v. Garner*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976) (Instr. 6 and 7); *U.S. v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927) (Instr. 6). The petitioner repeatedly testified that he relied on the Court decisions and referenced the *Garner* decision in both direct and cross examination. The instructions given by the Court do not adequately adivse the jury that such reliance is a defense to the crime charged.

Moreover, the instructions are intentionally slanted to give

the government's theories of the case an unfair edge in the minds of the jury. The Court instructed the jury with respect to the government's theories relating to "legal tender dollars", 5th Amendment, unconstitutionality of 16th Amendment and protest of income tax. The Court did not instruct on any of the petitioner's theories relating to the proper application of the "willfullness" defense. Indeed, the "Intent and Motive" instruction (given by the Court immediately following the only reference to the "willfullness" defense) amounts to a direction to disregard petitioner's good faith belief that he was following the law announced in *Garner*. This instruction, in the context of this case, amounts to a direction to the jury to return a verdict of guilty.

Similarly, the Court's refusal to include in its instruction a definition of "gain" as requested by defendant denied defendant the right to argue his theory of the case. See *Stepler v. U.S.*, 21 F.Supp. 737 (1921). See generally, *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916); *Eisner v. Macomber*, 252 U.S. 189 (1920).

VI

Defendant repeatedly requested the Court to appoint counsel at government expense. Defendant made his first request at the initial appearance before magistrate Cooper and repeatedly renewed this motion at every subsequent hearing. The defendant took the position that Rule 5 of the Federal Rules of Criminal Procedure not only does not limit appointment of counsel to indigency cases but supplements his constitutional right to counsel and authorizes appointment of counsel at government expense. Counsel has been able to find no cases directly on point which resolve the arguable disparity between Rule 5 of the Federal Rules of Criminal Procedure and the provisions of Title 18 United States Code, Section 3006A.

VII

Following the jury verdict, three hearings were held regarding petitioner's bail status, sentencing and cost bond. The net result of these hearings is that petitioner has been

required to post over $24,000.00 in cash and bond and faces the maximum sentence authorized for this violation of one year in jail and over $14,000.00 fine and costs. Counsel realizes that the trial Court is vested with great discretion in sentencing convicted defendants. *U.S. v. Hernandez-Salazar*, 471 F.2d 1209 9th Cir. (1970). However, in view of the fact that this is petitioner's first conviction of anything but minor traffic offenses, the sentence imposed is an abuse of discretion.

Counsel urges the Court to review the pre-sentence report and the record of the hearing following the polling of the jury (Polling – TR 3-6) and the two other post-trial hearings of August 7 and August 14, 1981. These hearings reflect: 1) Findings by the trial Court with respect to the possibility of flight that are totally unfounded in the records (Polling – TR 5); 2) Denial of hearing on petitioner's living arrangements and ties to the community (Polling – TR 5); 3) Requirement of $10,000.00 cash bail pending appeal vice bond for not apparent reason; 4) Imposition of maximum jail sentence for first offender in misdemeanor case; 5) Imposition of both $10,000.00 cash appeal bond and $14,617.25 cost bond.

These actions of the District Court are clearly abusive. And one of them, standing alone, may not call for reversal but taken as a whole clearly require that petitioner's sentence be set aside and the matter remanded to another judge for sentencing.

CONCLUSION

For the reasons noted above, petitioner prays that this Court reverse and remand his conviction.

Respectfully submitted,

GIROLAMI, EDMONDSON, POOLE & WOOD

By _____
L.S. EDMONDSON
Attorney for Petitioner